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9 Attorneys for USACM Liquidating Trust

10 **UNITED STATES BANKRUPTCY COURT**
 11 **DISTRICT OF NEVADA**

12 In re:

13 **USA COMMERCIAL MORTGAGE**
 14 **COMPANY,**

15 **Debtor.**

16 Case No. BK-S-06-10725-LBR

17 **CHAPTER 11**

18 **OBJECTION OF USACM**
 19 **LIQUIDATING TRUST TO PROOF**
 20 **OF CLAIM NO. 10725-01531-1 IN**
 21 **THE AMOUNT OF \$80,000 BY**
 22 **LEWIS H. FINE AND ARLENE J.**
 23 **FINE; AND CERTIFICATE OF**
 24 **SERVICE**

25 Date of Hearing: October 18, 2011

26 Time of Hearing: 1:30 p.m.

27 Estimated Time for Hearing: 10 minutes

28 The USACM Liquidating Trust (the "USACM Trust") recently discovered
 29 approximately 140 proofs of claim ("POC's") that had not been properly entered into the
 30 database of Sierra Consulting Group, LLC ("Sierra") and, therefore, had not been included
 31 in the loan by loan objections filed by the USACM Trust. The POC's contain claims that
 32 relate to investments in loans that the USACM Trust has already processed. Accordingly,
 33 where appropriate the USACM Trust is objecting to these remaining POC's on a claim by
 34 claim basis.

35 Pursuant to § 502 of title 11 of the United States Bankruptcy Code (the
 36 "Bankruptcy Code") and Rule 3007 of the Federal Rules of Bankruptcy Procedure (the
 37 "Bankruptcy Rules"), the USACM Trust requests an order allowing in part and
 38 disallowing in part Proof of Claim No. 10725-001531-1 filed by Lewis H. Fine and Arlene



1 J. Fine (the “Subject Proof of Claim”) against USA Commercial Mortgage Company
 2 (“USACM”) in the amount of \$80,000.¹

3 Here, the Subject Proof of Claim is based upon an \$80,000 investment in the HFAH
 4 Clear Lake Loan. The USACM Trust has already filed omnibus objections to claims
 5 arising out of Direct Lender investments in the HFAH Clear Lake Loan. Those objections
 6 seek to disallow 80% and allow 20% of the claims.² The USACM Trust seeks the same
 7 treatment for the Subject Proof of Claim. In association with those objections, on August
 8 9, 2011, the USACM Trust filed the Declaration of Geoffrey L. Berman in Support of
 9 Omnibus Objections to Proofs of Claim Based Upon the Investment in the HFAH Clear
 10 Lake Loan (“Berman Decl.”) [DE 8901]. A copy of the Berman Decl. with the hearing
 11 date redacted to avoid confusion and “Exhibit A”³ omitted will be served on the Fines with
 12 this Objection.

13 THIS OBJECTION DOES NOT RELATE TO AND WILL NOT IMPACT THE
 14 DIRECT LENDER’S RIGHT TO REPAYMENT FROM A BORROWER OR TO
 15 SHARE IN ANY PROCEEDS GENERATED FROM THE SALE OF REAL PROPERTY
 16 SECURING THE LOAN AT ISSUE.

17 **MEMORANDUM OF POINTS AND AUTHORITIES**

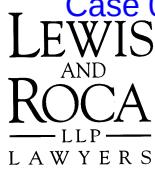
18 **I. BACKGROUND FACTS**

19 On April 13, 2006 (“Petition Date”), USACM filed a voluntary petition for relief
 20 under chapter 11 of the Bankruptcy Code. Debtor continued to operate its business as
 21 debtor-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.
 22 Debtor’s post-petition management of the Debtor was under the direction of Thomas J.

23
 24 ¹ In compliance with Nevada LR 3007, a copy of the first page of the Subject Proof of Claim is attached as
Exhibit A

25 ² The omnibus objections are scheduled to be heard by the Court on September 30, 2011 at 9:30 a.m.

26 ³ Exhibit A lists the Direct Lenders who may be affected by the HFAH Clear Lake omnibus objections.
 The claims of those Direct Lenders have no relevance to this objection and therefore Exhibit A will not be
 provided to the Fines with the Berman Decl.



1 Allison of Mesirow Financial Interim Management, LLC, who served as the Chief
 2 Restructuring Officer.

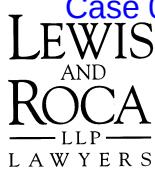
3 USACM was a Nevada corporation that, prior to the Petition Date, was in the
 4 business of underwriting, originating, brokering, funding and servicing commercial loans
 5 primarily secured by real estate, both on behalf of investors and for its own account. That
 6 business included the solicitation of investors to purchase fractional interest in loans that
 7 USACM originated and then serviced. These investors are referred to as "Direct Lenders"
 8 in USACM's bankruptcy case and in this Objection.

9 On January 8, 2007, this Court entered its Order Confirming the "Debtors' Third
 10 Amended Joint Chapter 11 Plan of Reorganization" as Modified Herein [Docket No.
 11 2376]. As part of the Plan, and pursuant to an Asset Purchase Agreement filed with this
 12 Court, USACM sold the servicing rights to most of the loans it serviced to Compass
 13 Partners, LLC and Compass Financial Partners, LLC ("Compass").

14 The USACM Trust exists as of the Effective Date of the Plan, which was March 12,
 15 2007. Geoffrey L. Berman is the Trustee. Under the Plan, the USACM Trust is the
 16 successor to USACM with respect to standing to seek allowance and disallowance of
 17 Claims under 11 U.S.C. § 502(a).

18 Upon information derived from filings in the United States District Court, District
 19 of Nevada, *3685 San Fernando Lenders Company, LLC, et al v. Compass USA SPE, LLC*,
 20 *et al*, No. 2:07-cv-00892-RCJ-GWF action, the Trust believes that "Silar Advisors, LP
 21 ("Silar") financed Compass' acquisition of the Purchased Assets, including the loan
 22 service agreements in the USACM bankruptcy case and took a secured interest in those
 23 Purchased Assets by executing a Master Repurchase Agreement ("Repurchase
 24 Agreement") with Compass, and by filing a UCC-1 financing statement with the State of
 25 Delaware." *Id.* Docket 1250 at 13-14 (citations to declarations omitted).

26



1 Further, from filings in the same action, the Trust believes that “Effective as of
 2 September 26, 2007, Silar foreclosed on Compass through Asset Resolution LLC (“Asset
 3 Resolution”) and took ownership of the Purchased Assets. ... Silar created Asset
 4 Resolution as a ‘single purpose entity,’ conveyed all of its interests in the Repurchase
 5 Agreement to Asset Resolution, and Asset Resolution properly foreclosed on the assets of
 6 Compass, including the Purchased Assets.” (Citations omitted.) Asset Resolution LLC is
 7 now a debtor in a chapter 7 bankruptcy case pending in Nevada, case no. BK-S-09-32824-
 8 RCJ, along with certain affiliates.⁴ William A. Leonard, Jr. was appointed trustee in the
 9 Asset Resolution case.

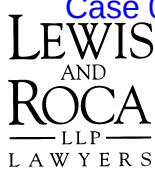
10 The Trust has attempted to monitor loan collections through monitoring the district
 11 court litigation and the ARC bankruptcy case, but has received limited information
 12 concerning servicing and resolution of direct loans by Compass/Silar/Asset Resolution or
 13 their successors, including the trustee in bankruptcy for Asset Resolution. The Trust has
 14 also been in contract with Cross FLC about certain loans that it is servicing, including the
 15 HFAH Clear Lake Loan. The following is the extent of the USACM Trust’s information
 16 on the current servicing and status of the HFAH Clear Lake Loan.

17 **a. The HFAH Clear Lake Loan**

18 USACM circulated an Offer Sheet to prospective Direct Lenders soliciting funding
 19 for an acquisition and development loan to a borrower identified as “Homes for America
 20 Holding” (“Borrower”).⁵ (Berman Decl., ¶ 4.) A copy of the Offer Sheet is attached
 21 hereto as **Exhibit B** and incorporated by this reference. *Id.* The total loan amount

22
 23 ⁴ 10 90 SPE LLC, Fiesta Stoneridge LLC, CFP Gramercy SPE LLC, Bundy 2.5 Million SPE LLC, CFP
 24 Cornman Toltec SPE LLC, Bundy Five Million LLC, Fox Hills SPE LLC, HFAH Monaco SPE LLC,
 25 Huntsville SPE LLC, Lake Helen Partners SPE LLC, Ocean Atlantic SPE LLC, CFP, Gess SPE LLC, CFP
 26 Anchor B SPE LLC, and Shamrock SPE LLC.

25 ⁵ The loan was ultimately made to HFAH Clear Lake, LLC, an entity owned and controlled by Homes for
 26 America Holdings, Inc. USA Investment Partners, and thus Thomas Hantges and Joseph Milanowski, held
 an interest in Homes for America Holdings. Upon information and belief, that direct interest in the parent
 company, and thus indirect interest in the Borrower, was not disclosed to the Direct Lenders.

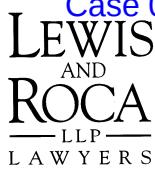


1 proposed was \$16,050,000. *Id.* The Offer Sheet described the investment as a “First Trust
 2 Deed Investment” and noted that the investment would be secured by a first deed of trust
 3 on approximately 11 acres of land in West Palm Beach, Florida. *Id.* The property was
 4 described as including a 180-unit apartment complex, and the Offer Sheet stated that the
 5 site had received approvals for 590 new condominiums that would replace the existing
 6 apartments, with 199 units already under contract for sale. *Id.* The Offer Sheet further
 7 provided that the loan had a 56% loan to value based on a December 15, 2005 appraisal
 8 from CB Richard Ellis.⁶ *Id.* The Offer Sheet also stated that the loan would be used to
 9 acquire the property and provide funds for the pre-development of the excess land for the
 10 construction of condominiums. *Id.*

11 On January 6, 2005, Borrower made and delivered to various lenders, including the
 12 Direct Lenders identified in Exhibit A, a “Promissory Note” (the “Note”) and a Loan
 13 Agreement. (Berman Decl., ¶ 5.) The Note and Loan Agreement provided for a loan of
 14 \$14,800,000, with potential future disbursements to the Borrower up to \$16,050,000. *Id.*
 15 The Note was secured by a Mortgage, Security Agreement, and Assignment of Rents
 16 (“Mortgage”) on real property and improvements thereon, as described in the Mortgage,
 17 and recorded on January 21, 2005 at Instrument Number 20050040083 in the Official
 18 Records of Palm Beach County, Florida, as were subsequent amendments to the Mortgage
 19 to secure subsequent advances. *Id.* The Note was also supported by an Unconditional
 20 Guaranty executed by Homes for America Holdings, Inc. on January 6, 2005. (Berman
 21 Decl., ¶ 6.)

22

23 ⁶ It appears that the CB Richard Ellis appraisal was not performed until many months after
 24 the loan documents were signed, however, the appraisal, with an as-is valuation of
 25 \$28,500,000, supports the asserted loan to value calculation. The property securing the
 26 HFA Clear Lake Loan had an approximate value as of May 24, 2006 of \$18,700,000
 based on a June 1, 2006 appraisal by Hilco Real Estate Appraisal, LLC and an
 approximately value as of June 5, 2007 of \$14,660,000 based on a July 6, 2007 appraisal
 by Herron Companies.



1 The USACM "Loan Summary" dated July 31, 2006 and filed in this case shows
 2 that Borrower was "non-performing" on the Note as of July 31, 2006. (Berman Decl.,
 3 ¶ 7.) During this bankruptcy case through the transfer of servicing to Compass, USACM
 4 treated the Direct Lenders with respect to any interim payments by the borrower in
 5 accordance with this Court's orders.

6 Counsel for the Trustee had a brief conversation with a representative of Cross,
 7 FLS regarding the status of the HFAH Clear Lake Loan. According to Cross, FLS, there
 8 is a second lien on the property that is currently held by ARC trustee. The property has
 9 not been sold and as a result of the automatic stay in the ARC bankruptcy, there has been
 10 no movement with respect to the foreclosure on the Deed of Trust, or the sale of the
 11 property. There are also tax liens against the property and the automatic stay has
 12 prevented foreclosure on those liens.

13 Counsel for the Trustee has reviewed the public records of Palm Beach County,
 14 Florida. The current property owner of collateral remains HFAH Clear Lake LLC
 15 according to the records available online from the County Assessor's office.

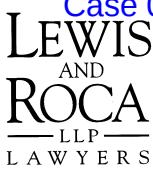
16 **II. JURISDICTION**

17 The Court has jurisdiction over this Objection pursuant to 28 U.S.C. §§ 1334 and
 18 157. Venue is appropriate under 28 U.S.C. §§ 1408 and 1409. This matter is a core
 19 proceeding under 28 U.S.C. § 502 and Bankruptcy Rule 3007.

20 The statutory predicates for the relief requested herein are 11 U.S.C. § 502 and
 21 Bankruptcy Rule 3007.

22 **III. APPLICABLE AUTHORITY**

23 Under the Bankruptcy Code, any Claim for which a proof of claim has been filed
 24 will be allowed unless a party in interest objects. If a party in interest objects to the proof
 25 of claim, the Court, after notice and hearing, shall determine the amount of the Claim and
 26 shall allow the Claim except to the extent that the Claim is "unenforceable against the



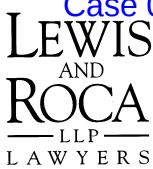
1 debtor . . . under any . . . applicable law for a reason other than because such claim is
 2 contingent or unmatured.” 11 U.S.C. § 502(b). A properly filed proof of claim is
 3 presumed valid under Bankruptcy Rule 3001(f). However, once an objection to the proof
 4 of claim controverts the presumption, the creditor ultimately bears the burden of
 5 persuasion as to the validity and amount of the claim. *See Ashford v. Consolidated*
 6 *Pioneer Mortg. (In re Consolidated Pioneer Mortg.)*, 178 B.R. 222, 226 (9th Cir. B.A.P.
 7 1995), *aff'd*, 91 F.3d 151 (9th Cir. 1996).

8 IV. OBJECTION

9 USA Investment Partners (“USA IP”) held a member interest in the Borrower’s
 10 parent, Homes for America Holdings, Inc. As such, and unlike many of the other loans
 11 brokered by USACM, the HFAH Clear Lake Loan was less than completely arms’ length.
 12 The project, however, was run by Homes for America Holdings, and does not appear to
 13 have been controlled by Joseph Milanowski or Thomas Hantges. Moreover, the Direct
 14 Lenders received the first position interest in the collateral securing the loan as promised
 15 by the Offer Sheet, and remain in first position with regard to any proceeds from
 16 liquidation of the collateral. In addition, the Direct Lenders took an obvious risk by
 17 investing in a promissory note secured by a lien on real property.

18 USACM is not liable for the Borrower’s default or any decrease in the value of the
 19 collateral. The Direct Lenders fail to state a claim because USACM does not appear to
 20 have breached the loan servicing agreements with respect to collection of the HFAH Clear
 21 Lake Loan.

22 Nonetheless, in light of the potential conflict of interest, the Trustee is prepared to
 23 allow a partial claim for the Fines in an amount equal to 20% of their claim. The Trust
 24 objects to the remaining 80% of the claim. USACM does not appear to have breached the
 25 loan servicing agreements with respect to collection of the loan.



This objection will not affect the Fines' right to be repaid on the HFAH Clear Lake Loan by the Borrower, or to recover from the sale of any collateral that secured the loan or arising out of any guaranty that supported the loan.

V. CONCLUSION

Here, the Subject Proof of Claim is based upon an \$80,000 investment in the HFAH Clear Lake Loan. For the foregoing reasons, the USACM Trust respectfully requests that the Court disallow 80% (\$64,000) and allow 20% (\$16,000) of the Subject Proof of Claim. This Objection will not affect the Fines' ability to collect from the Borrower on the promissory note or to receive compensation from the sale of the collateral securing the promissory note. The USACM Trust also requests such other and further relief as is just and proper.

DATED this 17th day of September, 2011.

LEWIS AND ROCA LLP

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Attorneys for the USACM Liquidating Trust



1 Copy of the foregoing and supporting
2 declaration by Geoffrey Berman [DE 8901]
3 with hearing date redacted and Exhibit A omitted
4 mailed by U.S. first class postage prepaid on
5 September 17, 2011 to:

6 Lewis H. Fine and Arlene J. Fine
7 P.O. Box 598
8 Heber City, UT 84032

9 LEWIS AND ROCA LLP

10 /s/Renee L. Creswell
11 Renee L. Creswell

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